

SECOND CIRCUIT REVIEW

Expert Analysis

Court Potentially Expands Asylum Criteria

This month, we discuss *Paloka v. Holder*,¹ in which the U.S. Court of Appeals for the Second Circuit vacated and remanded a decision by the Board of Immigration Appeals (BIA) that rejected petitioner Silvana Paloka's appeal from an immigration judge's denial of her application for asylum. Paloka's claim for asylum was based on her assertion that she was a member of a "particular social group," pursuant to the Immigration and Nationality Act (INA).² The court's opinion, written by Judge Jon O. Newman, and joined by Judges Jose A. Cabranes and John M. Walker, Jr., focused on the BIA's recent decisions that have clarified the criteria for what constitutes a "particular social group." Based on these recent decisions, the court vacated the BIA's decision and remanded the case for further proceedings.

Background

Paloka's parents lived in Berdice, Albania, an area that previously served as an internment camp for people who spoke out against the communist government.³ From the 1960s until the fall of the communist



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regime, Paloka's parents and grandparents were persecuted for their anti-communist ideology. In 1965, Paloka's grandparents had their land taken and were interned in the camp. In 1985, Paloka's father was disabled as a result of a beating at the hands of government agents. In 1989, Paloka was born in the internment camp.

When Paloka was 18 years old, she obtained a job as a hairdresser in a nearby town. To commute to and from work, she walked a considerable distance. Beginning in 2008, on three separate occasions while she was walking home from work a stranger harassed Paloka. The harassment intensified with each encounter. During the first incident, which occurred in May 2008, Paloka was returning home from work when she was approached by the stranger. The man stated to Paloka that he wanted to "meet her parents, marry her, and take her to Greece."⁴

Paloka declined the man's advances; however, he stated that she would

see him again. The man then got into a police car and drove away. Paloka informed her employer, Rita Mendoza, of the incident and Mendoza permitted her to leave work earlier to travel home when more people were still outside.

The next incident occurred in June 2008. Paloka was walking home from work and a police car stopped beside her. Two men got out of the car; one of the men was in a police uniform and the other was in civilian attire. The man in civilian attire was the same man who had accosted Paloka in May. The man in the police uniform stated to Paloka that he knew her family was not from the area, that they had been persecuted in the past, that her parents were disabled and that her younger brothers were too young to protect her. After this exchange, Paloka believed that the men wanted to sell her into prostitution. Before anything further occurred, three of Paloka's neighbors happened to be driving by and offered Paloka a ride home, which she accepted.

Shortly after the June 2008 incident, Paloka met with a local official and a village leader to notify them of what happened and to seek protection. The local official and the village leader both informed Paloka that they could not help her.

The third and final incident occurred in July 2008. Paloka left work at 8:30 p.m.; as it was late, Mendoza accompanied Paloka on her walk home. While

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walking, the women saw a police car stopped on an empty road. The same two men who had threatened Paloka in June emerged from the car. The men grabbed Paloka by her arms and hair and began to kick her. Mendoza screamed and tried to fight with the men. The men were attempting to force Paloka into the police car when an armed shepherd intervened and threatened to kill the two men unless they let Paloka and Mendoza go. Thereafter, the shepherd accompanied the two women to Paloka's home.

After this incident, Paloka and her parents agreed that she should live with her aunt and uncle in the city of Shkoder until she could leave the country. Paloka moved to Shkoder and subsequently left Albania and immigrated to the United States in August 2008.

Prior Proceedings

After arriving in the United States, Paloka filed a timely application for asylum and other relief. In connection with the administrative proceedings related to her applications, Paloka appeared before an immigration judge. Paloka testified that she was afraid to live anywhere in Albania because the threat of human trafficking for prostitution was pervasive throughout the country. While describing the proceedings before the judge, the court made citation to portions of the U.S. Department of State's Trafficking in Persons Report that generally support Paloka's contentions.⁵ In addition, the court cited to the immigration judge's acknowledgement that forced prostitution through sex trafficking "occurred relatively often in Albania" and was more common there than in other countries.⁶

At her hearing before the immigration judge, Paloka argued that she was part of a "particular social group" based on her membership in the following three groups: (1) "unmarried women"; (2) "young women in Albania"; and (3) "unmarried young women [living] in Albania."⁷ During

oral argument, she indicated that her third group could be further demarcated with an age definition of women between the age of 15 and 25.

Paloka's applications for asylum, withholding of removal, and protection under the Convention Against Torture, were denied by the immigration judge. The judge's denial of Paloka's applications was based on a determination that the groups were "too broad" and that Paloka was not targeted "on account of" her membership in a "particular social group," but instead because she was a "good target for criminal opportunistic behavior."⁸

The court's opinion focused on the BIA's recent decisions that have clarified the criteria for what constitutes a "particular social group."

In reviewing the immigration judge's decision, the BIA did not address whether the incidents amounted to persecution. Rather, the BIA stated that the three groups that Paloka proposed were "not defined with sufficient particularity to be cognizable particular social groups."⁹ In addition, the BIA rejected Paloka's proposed alternative social group based on her family's political ties, because she had not demonstrated that she was targeted based on her family's history. Ultimately, the BIA, like the immigration judge had previously, concluded that Paloka "was approached because she was a good target for criminal opportunistic behavior."¹⁰

Second Circuit's Decision

As the BIA did not expressly adopt the findings of the immigration judge, the court reviewed both the opinions of the judge and the BIA. The court reviewed factual findings made by the BIA and immigration judge under the substantial evidence standard, and questions of law and applications of legal principles de novo.

The court began its decision by referencing the relevant provisions of the INA.¹¹ The court explained that to establish one's eligibility for asylum or withholding of removal, the applicant must demonstrate persecution, or fear of persecution, that may be based on, among other things, one's membership in a "particular social group."¹² Direct governmental action is not required for a claim of persecution, as private acts are sufficient if the government is unable or unwilling to prohibit the persecution.¹³ To make out a claim based on one's membership in a "particular social group," the applicant must establish that the group itself was cognizable and that the alleged persecutor targeted the individual "on account of" his or her membership in that group.¹⁴

The court noted that the primary question in this case is whether the social groups in which Paloka claimed to be a member satisfy the statutory standard prescribed by the INA. The court explained that Congress did not define what it means to be a member of a "particular social group" in the INA, and thus the court accorded the BIA's interpretations deference pursuant to *Chevron*.¹⁵

The court then examined the evolution of the criteria used by the BIA in determining what constitutes a "particular social group." In its early decisions, the BIA indicated that membership in a "particular social group" meant that the "persecution... is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic."¹⁶ According to the BIA, the common characteristic that defined the group also needed to be "one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciousness."¹⁷

Subsequently, the BIA clarified its interpretation by specifying two additional factors a social group must have to qualify as a "particular social

group”—namely, “social visibility” and “particularity.”¹⁸ Furthermore, under these additional requirements, the BIA explained that the social group must have “well-defined boundaries” and be “‘recognizable’ as a discrete group by others in the society.”¹⁹

The BIA recently clarified its interpretation of what constitutes a “particular social group” in two companion cases issued in response to a U.S. Court of Appeals for the Third Circuit decision that declined to afford deference to its view of the “particularity” and “social visibility” requirements.²⁰ The BIA explained that the group must be: (1) “composed of members who share a common immutable characteristic”; (2) “defined with particularity,” and (3) “socially distinct within the society in question.”²¹

The court observed that the BIA’s reformulated test and accompanying analysis clarified several issues. The BIA changed the “social visibility” requirement to one of “social distinction,” and emphasized that the requirement “was never intended to, and does not, require literal or ‘ocular’ visibility.”²² With respect to the particularity requirement, the BIA explained that the social group in question “must be defined by characteristics that provide a clear benchmark for determining who falls within the group.”²³

The BIA indicated that “[t]he group must also be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective.”²⁴ The BIA clarified that the key issue in determining particularity and social distinction is whether society as a whole views a group as socially distinct, not the persecutor’s perception.²⁵ The BIA did note, however, that the persecutor’s perception can be indicative of whether society views a group as distinct.²⁶ The BIA elucidated further that “persecutory conduct aimed at a social group cannot alone define the group, which must exist independently of the persecution.”²⁷

The court acknowledged that cir-

cuit case law prior to the BIA’s recent decisions was inconsistent, citing its own prior decision and the decisions of sister circuits that underscored the uncertainty related to the status of social groups such as the ones proposed by Paloka.

Depending on the outcome of Paloka’s case on remand, children and young people living in countries in which they frequently are recruited or forced into criminal activity may have stronger claims for asylum and other relief, even if age, gender or location are the only identifiable reasons for their alleged persecution.

The court commented that the BIA’s recent decisions are helpful in evaluating cases like Paloka’s, which teeter between state-sponsored or state-condoned criminality on account of one’s membership in a “particular social group” and individuals who are threatened only because they live in a country that is rife with criminal activity. The court explained that if a petitioner likely would be targeted because of her membership in a sufficiently defined social group; then being a victim of a crime or even being a likely target for criminal opportunistic behavior should not necessarily preclude an otherwise valid asylum claim.

The court noted that the groups proposed by Paloka require reconsideration because Paloka refined her “particular social group” during the proceedings to include a specific age range of 15 to 25. Accordingly, the court held that vacating the BIA’s decision and remanding Paloka’s case for further proceedings was appropriate.

The court was careful to note that in remanding the case it made no determination as to whether Paloka has qualified as a member of a “particu-

lar social group,” or whether she can satisfy her burden to prove that she was persecuted or reasonably feared persecution based on her membership in such a group.

Implications

The Second Circuit’s ruling, and the BIA’s decision on remand, may expand the group of applicants who are eligible for asylum based on characteristics that previously were seen as too broad or amorphous to constitute a “particular social group” under the INA. Depending on the outcome of Paloka’s case on remand, children and young people living in countries in which they frequently are recruited or forced into criminal activity may have stronger claims for asylum and other relief, even if age, gender or location are the only identifiable reasons for their alleged persecution.

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1. *Paloka v. Holder*, No. 12-4987-ag, 2014 WL 3865992 (2d Cir. Aug. 7, 2014).

2. 8 U.S.C. §1101(a)(42)(A).

3. The court noted that the immigration judge found Paloka credible; thus the court utilized her testimony and the judge’s factual findings to set forth the facts of her case. See *Paloka*, 2014 WL 3865992, at *1.

4. *Paloka*, 2014 WL 3865992, at *1.

5. See 2008 U.S. Department of State, *Trafficking in Persons Report* (2009), available at <http://www.state.gov/j/tip/rls/tiprpt/2009/> (last accessed Aug. 9, 2014).

6. *Paloka*, 2014 WL 3865992, at *2.

7. *Id.* at *2.

8. *Id.*

9. *Id.* at 3.

10. *Id.*

11. 8 U.S.C. §§1101(a)(42); 1231 (b)(3).

12. *Id.*

13. *Paloka*, 2014 WL 3865992, at *3 (citations omitted).

14. *Id.*

15. See *Chevron, U.S.A. v. Natural Resources Def. Council*, 467 U.S. 837, 842-43, 104 S. Ct. 2778 (1984); cf. *Scialabba v. Cuellar de Osario*, ___U.S.___, 134 S. Ct. 2191, 2203-07 (2014) (plurality opinion).

16. *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

17. *Id.*

18. *In re M-E-V-G*, 26 I. & N. Dec. 227, 232 (B.I.A. 2014) (citation omitted).

19. *Id.* (citation omitted).

20. See *Valdiviezo-Galdamez v. Attorney General of U.S.*, 663 F.3d 582 (3d Cir. 2011); see also *In re M-E-V-G*, 26 I. & N. Dec. 227, 232 (B.I.A. 2014) and *In re W-G-R*, 26 I. & N. Dec. 208 (B.I.A. 2014).

21. *In re M-E-V-G*, 26 I. & N. Dec. at 237.

22. *Id.* at 234-36.

23. *Id.* at 239.

24. *Id.*

25. *Id.* at 242.

26. *Id.*

27. *In re W-G-R*, 26 I. & N. Dec. at 215.